Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 98 PENSION FUND,

Petitioner,

v.

ANDREW CARNEY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 98 PENSION FUND'S PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. ERISA regulation 29 C.F.R. § 2560.503-1(h)(2)(iv) requires that all employee benefit plans must establish a procedure by which a full and fair review of an adverse benefit determination is provided. The United States Court of Appeals for the Third Circuit prohibited the Petitioner from introducing Respondent's medical records in connection with a disability pension but not discovered until after the Trustees decided Respondent's claim for benefits. Are the excluded medical records required to be considered in these proceedings in order to provide a full and fair review of the denial of Respondent's claim?

2. On the basis of the whole record doctrine enunciated by the United States Court of Appeals for the Third Circuit in *Mitchell v. Eastman Kodak, Co.*, 113 F.3d 433 (3d. Cir. 1997), the District Court prohibited the consideration of Respondent's medical records that were not discovered until after the Trustees denied Respondent's claim. Because the Trustees had been unable to consider Respondent's medical records in connection with his application for disability benefits, was the lower Court's finding of arbitrariness and capriciousness, which was based upon the Trustees' failure to comply with the Plan's time limits, premature and unjustified given Respondent's failure to comply with the Trustees' request for all medical information?

PARTIES TO THE PROCEEDINGS

Petitioner

International Brotherhood of Electrical Workers Local Union No. 98 Pension Plan

Respondent

Andrew Carney

Other Parties

Trustees John J. Dougherty, Edward Neilson, Joseph Agresti, Thomas J. Reilly, Jr., Dennis Link and William Rhodes were parties in the proceedings below but are not parties to this Petition for Writ of Certiorari.

CORPORATE DISCLOSURE STATEMENT

Petitioner is not a public company and there is no parent company of Petitioner

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OPINIONS BELOW

The judgment and opinions of the Court of Appeals from which this appeal is taken are unpublished. The judgment and opinion of the United States District Court for the Eastern District of Pennsylvania denying the Plan's motion for summary judgment and granting Carney's motion for summary judgment is also unpublished. These opinions are included in the Appendix at App. 1-App. 40.

STATEMENT OF JURISDICTION

The Court of Appeals entered judgment against the Plan on May 16, 2003. The Plan's petition for rehearing was denied on June 24, 2003. The Plan timely filed this Petition for Certiorari under Supreme Court Rule 13. This Court has jurisdiction under 28 U.S.C. § 1254(1): "Cases in the courts of appeals may be reviewed by the Supreme Court by the following method: (1) By writ of certiorari granted upon the petitioner to any civil or criminal case, before or after rendition of judgment or decree[.]"

STATUTORY PROVISIONS INVOLVED IN THIS CASE

29 C.F.R. § 2560.503-1(h)(2)(iv), provides:

(h) Appeal of adverse benefit determinations.

(2) *Full and fair review*: . . . the claims procedures of a plan will not be deemed to provide a claimant with a reasonable opportunity for a full

and fair review of a claim and adverse benefit determination unless the claims procedures –

(iv) Provide for a review that takes into account all comments, documents, records, and other information submitted by the claimant relating to the claim, without regard to whether such information was submitted or considered in the initial benefit determination.

STATEMENT OF THE CASE

A. Statement of Jurisdiction

The District Court had Federal Question Jurisdiction under 28 U.S.C. § 1331 because the action was brought pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, *et seq.*, more specifically, 29 U.S.C. § 1104 and 28 U.S.C. § 1331 (Federal Question). This Petition for Writ of Certiorari is sought under Rules 10(a) and (c) of the Supreme Court Rules, which provide, in applicable part, as follows:

> A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court Considers:
>
> (c) a . . . United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court.

B. Relevant Factual Background

1. Summary of the Proceedings.

Respondent, Andrew Carney ("Carney"), applied for a disability pension from the International Brotherhood of Electrical Workers Local 98 Pension Fund ("Fund") on June 21, 1996, nearly five years after suffering from the injury he alleged caused the disability. The Fund's Trustees evaluated and denied Carney's pension application. On December 12, 2000, Carney filed a lawsuit against the Fund. Carney asserted several claims under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, *et seq.* ("ERISA").

After Carney filed his lawsuit, the Fund discovered that Carney failed to produce his complete medical records with his disability pension application even though he was asked to do so. In response to Carney's complaint, the Fund asserted the affirmative defense of fraud, based upon Carney's failure to provide the medical records. Carney never responded to this affirmative defense. On December 7, 2001, Carney and the Fund filed cross-motions for summary judgment. On March 23, 2003, the District Court granted Carney summary judgment and found that the Trustees' decision to deny Carney's disability pension benefits was arbitrary and capricious based upon the manner of the Trustees' deferral and denial of Carney's benefits. The District Court also struck the affidavits detailing Carney's failure to produce his medical records because, according to the court, they were prohibited by the "whole record doctrine." The whole record doctrine focuses only on the documents reviewed by the decision-makers during the benefits determination. Any other documents are prohibited from being introduced

regardless of their relevance or why they were not considered during the original determination. Thus, the District Court excluded all documents not considered by the Trustees when evaluating Carney's application, most importantly his medical records, which he failed to produce. The District Court gave no consideration as to why the records were not part of the "whole record." The Fund appealed to the United States Court of Appeals for the Third Circuit, which affirmed the District Court's decision to award Carney's disability pension.

2. The Plan's Appeal to the Court of Appeals for the Third Circuit of the District Court's Grant of Summary Judgment in Favor of Carney.

In its appeal to the Court of Appeals for the Third Circuit, the Fund asserted that the District Court misapprehended and misapplied the law, among other ways, by failing to allow the Fund to engage in a full review of Carney's application by including his medical records in that review. Carney's medical records were required in order to evaluate his medical condition as required by the Plan. In addition, the Fund argued that the use of the whole record doctrine here was at odds with the requirements of 29 C.F.R. § 2560.503-1(h)(2)(iv), which requires all evidence to be considered in order that there be a full and fair review of all pension decisions.

The Third Circuit's May 16, 2003 opinion affirmed the District Court's opinion to grant Carney's pension, but did not deal with the 29 C.F.R. § 2560.503-1(h)(2)(iv) issue. In so doing, the Third Circuit ignored the conflict between 29 C.F.R. § 2560.503-1(h)(2)(iv) and the whole record doctrine.

Furthermore, the Third Circuit did not address the ultimate result of the District Court's decision – Carney's receipt of a disability pension without ever having been fully and properly reviewed under the requirements of the Plan. The Third Circuit denied rehearing on June 24, 2003.

ARGUMENT

1. The Conflict between the Whole Record Doctrine and the ERISA Regulation Must Be Resolved.

This case raises an important contradiction between the whole record doctrine and the recently revised ERISA regulations. The District Court used the whole record doctrine to exclude records that should be considered under the provisions of 29 C.F.R. § 2560.503-1(h)(2)(iv).

The whole record doctrine forbids the introduction of evidence that was not before the administrator(s) when making the decision at issue from being reviewed. *Mitchell v. Eastman Kodak, Co.*, 113 F.3d 433, 440 (3d Cir. 1997). The whole record doctrine focuses on a review of the record once it has been created. The newly amended ERISA regulation effective January 1, 2002 presents a much more expansive view of what must be included in the record even after an initial determination has been made. The regulation requires employee benefit plans to provide a procedure for an applicant to appeal an adverse plan benefit decision and to be provided a full and fair review of the benefit determination ("Claim Procedure"). Under the regulations, a Claim Procedure will not be deemed to provide a "full and fair review of a claim and adverse

benefit determination unless the claims procedures ... provide for a review that takes into account all comments, documents, records and other information submitted by the claimant relating to the claim, without regard to whether such information was submitted or considered in the initial benefit determination."[1] 29 C.F.R. § 2560.503-1(h)(2)(iv).

The FRISA regulations cannot coexist with the whole record doctrine. The regulations require the inclusion of evidence excluded by the whole record doctrine. Here, the Trustees should be able to supplement the record with Carney's newly discovered medical records. The whole record doctrine excludes the very same records. The Third Circuit's decision ignores the regulation and causes a result contrary to the regulation's language by continuing to exclude the medical records. The application of the whole record doctrine without any consideration of the impact of the ERISA regulations warrants the attention of this Court.

2. The Trustees' Delay in Deciding Carney's Application Does Not Warrant Awarding Carney's Pension.

This decision also raises an issue as to what constitutes arbitrary and capricious actions among ERISA plan decision-makers. The lower courts found that the Fund's Trustees' actions were arbitrary and capricious based upon

[1] Although the regulations speak in terms of claimants, to achieve the full and fair review of which the regulation speaks, both parties to the decision must be permitted to supplement the record.

the Trustees' failure to act within the time frame set forth by the pension plan. Carney's failure to produce his medical records must override the Trustees' delayed actions. The effect of the lower courts' ruling here is to award Carney a disability pension because of a minor error by the Trustees – totally ignoring Carney's greater wrong of failing to provide his complete medical records. This yields the absurd result of awarding benefits to an applicant who may not be entitled to them and who failed to meet all of the application requirements.

Moreover, as fiduciaries of the Plan, the Trustees must act "solely in the interest" of Plan participants and beneficiaries. *See* 29 U.S.C. § 1102(a)(1)(A). The Plan participants and beneficiaries are not benefited if an individual who is not disabled and was able to mask his medical history by failing to produce his medical records as required is awarded a disability pension. Any award to Carney without a review of his full medical history would be arbitrary and capricious, yet that is what the District Court ordered and the Third Circuit affirmed. To properly evaluate the Trustees' actions and Carney's entitlement to a pension, this matter must be remanded to the District Court for a trial on the merits and include Carney's medical records for consideration. Further review of his claim is required.

CONCLUSION

It is respectfully requested that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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September 22, 2003

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 02-2679 and 02-3488

ANDREW CARNEY

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 98 PENSION FUND; SCOTT ERNSBERGER, ADMINISTRATOR; JOHN J. DOUGHERTY, TRUSTEE; EDWARD NEILSON, TRUSTEE; JOSEPH AGRESTI, TRUSTEE; THOMAS J. REILLY, JR., TRUSTEE; DENNIS LINK, TRUSTEE; WILLIAM C. RHODES, TRUSTEE

International Brotherhood of Electrical Workers
Local Union 98 Pension Fund,
Appellant

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA
D.C. Civil No. 00-cv-06270
District Judge: The Honorable James McGirr Kelly

Argued April 8, 2003

Before: BECKER,* BARRY and BRIGHT,** *Circuit Judges*

(Opinion Filed: May 16, 2003)

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OPINION

BARRY, *Circuit Judge*

This appeal arises out of a lawsuit brought by appellee Andrew Carney against the International Brotherhood of Electrical Workers Local 98 Pension Fund ("the Fund") and its Trustees ("the Trustees") to recover unpaid employment benefits pursuant to section 502(a)(1) of the Employee Retirement Income Security Act ("ERISA"), 29

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* Judge Becker completed his term as Chief Judge on May 4, 2003.

** The Honorable Myron H. Bright, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

U.S.C. § 1132(a)(1). In his complaint, Carney alleged that the Trustees arbitrarily and capriciously denied his June 18, 1996 application for disability pension benefits, benefits to which he was entitled under the Fund's pension plan ("the Plan"). The Fund appeals the District Court's memorandum and order, filed May 24, 2002, in which the Court determined that the Trustees' denial of Carney's application was arbitrary and capricious, and granted Carney's motion for summary judgment, awarding him the unpaid disability benefits. An appeal is also taken from the District Court's subsequent memorandum and order, filed August 14, 2002, granting Carney's motion for attorneys' fees and costs pursuant to section 502(g)(1) of ERISA, 29 U.S.C. § 1132(g)(1), and awarding attorney's fees in the aggregate amount of $104,062.50 plus costs.[1]

We have jurisdiction over these consolidated appeals pursuant to 28 U.S.C. § 1291. Because we agree, after a thorough review of the record, that the Trustees' denial of Carney's disability pension application was arbitrary and capricious, we will affirm the District Court's May 24, 2002 order. As to the award of attorneys' fees, however, we find that the amount of fees allowed by the District Court was, as to certain items, excessive. We will, therefore, vacate the August 14, 2002 order and remand for entry of a judgment awarding fees in accordance with this opinion.

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[1] The actual amount of fees awarded in the August 14, 2002 order was $95,940 to reflect $8,122.50 already awarded in conjunction with an earlier motion for fees.

I.

Because we write primarily for the parties, we recount only those facts essential to our decision. Carney joined the International Brotherhood of Electrical Workers Local Union 98 ("Local 98") in 1962. Local 98 maintained the Plan, which provided retirement and disability pension benefits to its members. On July 31, 1991, while working as an electrician, Carney suffered a serious laceration to his right hand, severing an artery and causing nerve damage. He has not worked as an electrician since the July 1991 accident.

On June 21, 1996, Carney submitted an application for disability pension benefits under the Plan. At the time of his application, the Plan provided that a member was eligible for disability benefits if the member: (1) was determined by the Plan physician to be "totally and permanently disabled" or qualified for federal social security long-term disability benefits; (2) was not engaged in regular employment as an electrician; (3) was at least thirty years old; and (4) met certain vesting requirements. The Plan also imposed obligations on the Trustees concerning the consideration and resolution of benefits claims, requiring them to either decide claims within 90 days of their submission, or, if additional time was required, to notify the applicant of the reason for the delay and decide the claim within 180 days of its submission.

At the time of his application, Carney met the second, third and fourth eligibility requirements for disability benefits – that is, he was over 30 years old, had more than five years of credited work history, and had not worked as an electrician since 1991. In order to finalize his application, the Plan Administrator notified Carney that he

needed to be examined by the physician designated by the Plan to make disability determinations, Dr. Michael LeWitt, and instructed Carney to forward relevant medical records to Dr. LeWitt. Carney subsequently attempted to contact the Plan Administrator to notify him that he might have difficulty obtaining his voluminous medical records before his examination and to request assistance in obtaining the records. After the Plan Administrator failed to respond to Carney's request for assistance, however, Carney went ahead with the examination by Dr. LeWitt without the benefit of the medical records concerning his injury. The same day he examined Carney, August 30, 1996, Dr. LeWitt notified the Trustees that, in his opinion, Carney was "totally and permanently disabled" under the Plan definition as a result of the injury to his right hand. Dr. LeWitt's disability determination satisfied the only remaining requirement for disability benefits detailed by the Plan. Thus, as of July 31, 1991, only final approval by the Trustees stood between Carney and his disability pension benefits.

The Trustees, however, deferred a decision on Carney's completed application for nearly a year, before ultimately denying it on July 3, 1997. Carney did not receive notice that his application had been deferred until December 20, 1996, when the Plan Administrator sent him a three-sentence letter which simply notified him, without any explanation, that his application had been deferred. The Trustees' depositions, however, indicate that the Trustees harbored suspicions as to whether Carney was indeed disabled, despite Dr. LeWitt's finding of total and permanent disability. Despite their suspicions, the Trustees never requested that Carney provide any additional information or undergo a further physical examination.

Instead, the Trustees decided to amend the Plan to modify the eligibility requirements for disability benefits. Carney received another letter from the Plan Administrator on May 7, 1997 advising him that the Trustees would not reach a decision on his application until a "review of Plan procedures regarding disability pension applications has been finalized." Two weeks later, at a meeting on May 22, 1997, the Trustees voted to amend the Plan to require that applicants qualify for federal social security long-term disability benefits in order to be eligible for disability pension benefits. At the same meeting, the Trustees voted to deny Carney's application because it did not satisfy the new disability eligibility requirement. On July 3, 1997, nearly 13 months after the date of Carney's original application, the Plan Administrator notified him that his application had been denied, and had been denied solely because he had not met the amended eligibility requirement.

Carney, *pro se*, filed a timely administrative appeal with the Trustees, dated September 2, 1997, inquiring why his application had been deferred for such a long time, and why the amended eligibility requirement was relevant to his application filed nearly a year earlier. In a letter dated December 12, 1997, the Trustees denied Carney's appeal, simply reiterating his failure to meet the amended eligibility requirement. After unsuccessfully applying for social security disability benefits in an attempt to comply with the new requirement, Carney, now with the assistance of counsel, filed a supplemental appeal with the Trustees on November 15, 1999. On June 19, 2000, the Trustees summarily denied the supplemental appeal due to Carney's failure to satisfy the amended eligibility requirement. Again, the Trustees had not attempted to obtain any

additional information about Carney's medical condition, despite his delivery of the signed release to obtain his medical records requested by Fund counsel in conjunction with Carney's supplemental appeal.

Carney filed suit against the Plan, the individual Trustees, and the Plan Administrator on December 11, 2000. His complaint asserted three causes of action: (1) an ERISA claim that the Trustees breached their fiduciary duty under 29 U.S.C. § 1104(a)(1)(A) in delaying and denying his application; (2) a claim that the Trustees failed to provide requested Plan documents as required by ERISA in 29 U.S.C. § 1024(b); and (3) a claim under 29 U.S.C. § 1132(a)(1)(B) for the disability benefits wrongfully denied. The Complaint sought an injunction requiring the Trustees to grant Carney's application, compensatory damages, and reasonable attorneys' fees under 29 U.S.C. § 1132(g)(1).

The parties subsequently filed cross-motions for summary judgment. On May 23, 2002, the District Court granted the Trustees' motion for summary judgment as to the first and second counts of the complaint – the claims for breach of fiduciary duty and failure to produce Plan documents – but granted Carney's motion for summary judgment as to the third count, holding that the undisputed facts showed that the Trustees had arbitrarily and capriciously denied Carney's application for disability benefits under the Plan. The Court ordered the Fund to pay the requested benefits.

Carney thereafter filed a motion for an award of attorneys' fees and costs pursuant to 42 U.S.C. § 502(g)(1), which, as noted above, was granted by the District Court in an order filed August 14, 2002. In support of the motion,

counsel's time records indicated that he had spent a total of 512.8 hours on the case, including 174.7 hours preparing for, taking, and reviewing the depositions of six Trustees and the Plan Administrator, and 44.6 hours preparing Carney's summary judgment motion. After reviewing the records, the District Court found that the number of hours claimed by counsel was excessive. The Court deducted 10 hours from the 44.6 billed for the preparation of the summary judgment motion, 29.9 hours from the time billed for depositions, and an additional 10.3 hours because some time records lacked specificity, for an overall deduction of 50.2 hours. The Court then multiplied the remaining hours by an hourly rate of $225, resulting in a fee award of $104,062.50 plus costs, minus $8,122.50 that had been awarded previously.

II.

Our review of the District Court's grant or denial of a motion for summary judgment is plenary, and we thus apply the same standard as the District Court. *Haugh v. Allstate Ins. Co.*, 322 F.3d 227, 230 (3d Cir. 2003). That is, summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

In the ERISA context, where an employee benefit plan expressly gives the plan administrator discretion over the interpretation and application of plan provisions, a district court reviews the administrator's or fiduciary's determinations under an arbitrary and capricious standard. *Mitchell v. Eastman Kodak Co.*, 113 F.3d 433, 438-39 (3d Cir. 1997). The parties do not dispute that the Plan here authorized

such discretion, and the District Court was thus clearly correct to apply the arbitrary and capricious standard of review to Carney's claim for benefits. "Under the arbitrary and capricious standard, the court must defer to the administrator of an employee benefit plan unless tne administrator's decision is clearly not supported by the evidence in the record or the administrator has failed to comply with the procedures required by the plan." *Abnathya v. Hoffman-La Roche, Inc.*, 2 F.3d 40, 41 (3d Cir. 1993). This articulation of the standard comports with ERISA's express statutory charge that a plan administrator or other fiduciary "discharge his duties with respect to a plan . . . in accordance with the documents and instruments governing the plan. . . . " 29 U.S.C. § 1104(a)(1)(D).

On appeal, the Fund advances three arguments as to why the District Court erred when it granted Carney's motion for summary judgment. First, it argues that in reviewing under the arbitrary and capricious standard, the District Court improperly limited the record to that evidence that was before the Trustees at the time they denied Carney's benefits application and subsequent administrative appeals. Second, it argues that the record evidence does not establish that the Trustees' handling of Carney's application was arbitrary and capricious. And third, it argues that even if the Trustees' actions were arbitrary and capricious, the District Court should have remanded the case to the Trustees for further consideration rather than awarding Carney the requested benefits outright. Each of these arguments is without merit.

As an initial matter, the District Court properly limited the record on summary judgment to the administrative record that was before the Trustees at the time of their decision. Because the purpose of arbitrary and

capricious review is to determine the reasonableness of the determination at the time it was made, the reviewing court may only consider evidence that was contained in the record at that time. *Mitchell,* 113 F.3d at 440; *Abnathya,* 2 F.3d at 48 n.8. The purpose of so limiting the record is to encourage communication between plan administrators or fiduciaries and beneficiaries in order that conflicts can be resolved without resort to litigation. *See Vega v. National Life Ins. Servs., Inc.,* 188 F.3d 287, 300 (5th Cir. 1999). To allow the introduction of evidence as to what occurred after the administrative process had been completed would effectively remove any incentive to conduct an adequate investigation of claims to resolve disputes at the administrative level – precisely what the Trustees failed to do here.

Properly limiting the scope of review to the administrative record, the undisputed evidence demonstrates that the Trustees' denial of Carney's application was, indeed, arbitrary and capricious. The Trustees breached express Plan provisions, as well as the ERISA regulations mandating those provisions, in their handling and ultimate denial of Carney's disability benefits application. For starters, the record contains no evidence that the Trustees attempted to comply with the Plan provisions requiring that an application for benefits be decided within 90 days of the receipt of the application, or, if additional time is needed, within a maximum of 180 days if notice is given to the applicant within 90 days explaining the reason for the delay. These time constraints upon benefits determinations by plan administrators and fiduciaries are expressly mandated by ERISA's implementing regulations in 29 C.F.R. § 2560.503-1(f)(1). Here, the Trustees did not even consider Carney's

application until more than 120 days after Carney submitted his application and then they failed to provide him with a timely explanation for the delay of a decision on his application. By the time the Trustees finally denied the application on July 3, 1997 based on the amended Plan eligibility provision, Carney's application had been pending for over a full year – more than twice as long as the maximum time that the both the Plan and the regulations allow.

The Trustees not only entirely ignored these procedural requirements imposed by the Plan itself and by ERISA regulations, they also disregarded the fact that Carney had satisfied all of the Plan's requirements for benefits at the time Dr. LeWitt sent his disability determination to them. Although the Trustees repeatedly contend that Carney failed to adequately apprise them of his medical condition, they never asked that Carney be examined by another physician or requested that he submit any medical records. The Trustees' speculative opinions and suspicions concerning the genuineness of Carney's disability were entirely unsupported by any medical evidence in the administrative record. In sum, the undisputed evidence indicates that the Trustees' decision to defer and then to deny Carney's application was arbitrary and capricious: it violated Plan provisions, was inconsistent with express ERISA requirements, and was entirely unsupported by record evidence. *See Skretvedt v. E.I. DuPont de Nemours & Co.*, 268 F.3d 167, 184 (3d Cir. 2001); *Mitchell*, 113 F.3d 433, 442-43 (3d Cir. 1997).

Finally, the District Court's decision to directly award Carney his benefits, rather than remand the case to the

Trustees, was not an abuse of discretion.[2] To allow the Trustees yet another opportunity to substantiate their suspicions after they already had nearly four years of administrative proceedings, including two administrative appeals, within which to conduct a further investigation into Carney's medical condition would contravene the underlying policies of ERISA and invite similar dilatory behavior by ERISA fiduciaries. *See Zervos v. Verizon New York, Inc.*, 277 F.3d 635, 648 (2d Cir. 2002); *Caldwell v. Life Ins. Co. of North America*, 287 F.3d 1276, 1288-89 (10th Cir. 2002). Accordingly, we will affirm the grant of summary judgment to Carney and the award of benefits, the remedy the District Court believed to be appropriate.

III.

While we will affirm the District Court's May 23, 2002 order, we will vacate its August 14, 2002 order awarding Carney attorneys' fees in the amount of $104,062.50 and remand for the entry of a judgment awarding fees in accordance with this opinion. We review the District Court's decision to award fees, and the reasonableness of the fees awarded, for abuse of discretion. *See* 29 U.S.C. § 1132(g)(1) ("In any action brought under this subchapter

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[2] Although we have not explicitly addressed the appropriate standard of review, several other courts of appeals have held that a District Court's choice of remedy in ERISA benefits denial cases is reviewed for abuse of discretion. *See, Cook v. Liberty Life Assurance Co. of Boston*, 320 F.3d 11, 24 (1st Cir. 2003); *Zervos v. Verizon New York, Inc.*, 277 F.3d 635, 648 (2d Cir. 2002); *Grosz-Salomon v. Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1163 (9th Cir. 2001); *Halpin v. W.W. Grainger, Inc.*, 962 F.2d 685, 697 (7th Cir. 1992).

. . . , the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.").

The only error we see in the fee award concerns the District Court's determination of the number of hours that Carney's counsel reasonably expended on the depositions in this case. The Court's decision to award fees in the first instance, after carefully considering the required factors, was clearly not an abuse of discretion. *See Ursic v. Bethlehem Mines,* 719 F.2d 670, 673 (3d Cir. 1983). Moreover, the Court considered all of the time records submitted by Carney's counsel. And finally, the Court's determination that an hourly billable rate of $225 per hour was a reasonable rate for calculating the lodestar amount was likewise not an abuse of discretion. *See Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983).

But "[h]ours are not 'reasonably expended' " if they are "excessive, redundant, or otherwise unnecessary." *Id.* Here, the time spent by Carney's counsel preparing for depositions and reviewing deposition transcripts is clearly excessive. Counsel claimed reimbursement for a total of 174.7 hours for preparing for, taking, and reviewing the depositions of six Trustees and the Plan Administrator, despite the fact that these depositions concerned identical subject matter, all occurred within a six-week period, and each only lasted between five and seven hours. On average, this translates into approximately 25 hours claimed per deposition, even though all involved largely the same documents, questions and events.

While the District Court correctly recognized that the hours claimed in connection with these depositions were excessive, its deduction of only 39.9 hours from the total request of 174.7 hours was, as we see it, an insufficient

adjustment to compensate for the redundancy of deposition preparation and review. *See Rode v. Dellarciprete,* 892 F.2d 1177, 1183 (3d Cir. 1990). Especially where the lodestar amount is calculated using a billing rate of $225 per hour to reflect counsel's status as an ERISA expert, the time preparing to address the same issues and reviewing similar testimony is, in our view, unreasonable.

The District Court has already carefully considered the fee issue, and appropriately considered it in light of the relevant factors as, of course, have we. We have determined that it would make little sense to require the District Court to further consider that issue in light of the fact, and fact in our view it be, that a 25% reduction for the remaining hours claimed in connection with the preparation for and review of the depositions in this case would give Carney the maximum amount of attorneys' fees to which we find he could reasonably be entitled. Accordingly, we will remand so that the District Court can reduce the 134.8 remaining hours claimed in connection with the depositions by 25% and otherwise reenter its order of August 14, 2002.

IV.

For the foregoing reasons, we will affirm the District Court's May 23, 2002 order granting Carney's motion for summary judgment and awarding the requested benefits, but will vacate the August 14, 2002 order awarding attorneys' fees and remand for entry of a judgment consistent with this opinion.

TO THE CLERK OF THE COURT:

Kindly file the foregoing Opinion.

/s/ Maryanne Trump Barry
Circuit Judge

App. 16

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 02-2679 and 02-3488

ANDREW CARNEY

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 98 PENSION FUND; SCOTT ERNSBERGER, ADMINISTRATOR; JOHN J. DOUGHERTY, TRUSTEE; EDWARD NEILSON, TRUSTEE; JOSEPH AGRESTI, TRUSTEE; THOMAS J. REILLY, JR., TRUSTEE; DENNIS LINK, TRUSTEE; WILLIAM C. RHODES, TRUSTEE

International Brotherhood of Electrical Workers Local Union 98 Pension Fund,

Appellant

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
D.C. Civil No. 00-cv-06270
District Judge: The Honorable James McGirr Kelly

Argued April 8, 2003

Before: BECKER,[1] BARRY and BRIGHT,[2] *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued on April 8, 2003.

On consideration whereof, it is now here ordered and adjudged by this Court that the order granting appellant's motion for summary judgment and awarding the requested benefits be and hereby is affirmed and the order awarding attorneys' fees be and hereby is vacated and the matter remanded for entry of a judgment consistent with this opinion. Appellant is awarded two-thirds of the costs.

All of the above in accordance with the Opinion of this Court.

/s/ Patricia S. Dodszuweit
Acting Clerk

Dated: May 16, 2003

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[1] Judge Becker completed his term as Chief Judge on May 4, 2003.

[2] The Honorable Myron H. Bright, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANDREW CARNEY	:	CIVIL ACTION
v.	:	
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 98 PENSION FUND, et al.	:	No. 00-6270

MEMORANDUM AND ORDER

J.M. KELLY, J. **MAY 23, 2002**

Presently before the Court are Cross-Motions For Summary Judgment filed by the Plaintiff, Andrew Carney and Defendants, International Brotherhood of Electrical Workers Local Union 98 Pension Fund, Scott Ernsberger, John J. Dougherty, Edward Neilson, Joseph Agresti, Thomas J. Reilly, Jr., Dennis Link and William C. Rhodes (collectively "Defendants"). Plaintiff also seeks to strike two affidavits submitted by Defendants and urges this Court to grant sanctions on the basis that Defendants submitted these affidavits in bad faith. This lawsuit arises out of Defendants' denial of Disability Retirement Benefits to Plaintiff who alleges Defendants violated various sections of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1276 (1994).

BACKGROUND

The Plaintiff has been a fully vested participant in the International Brotherhood of Electrical Workers Local Union No. 98 Pension Plan ("Plan") since 1962. In July of

1991, Plaintiff suffered a laceration of his right hand which prevented him from performing the duties of an electrician. He received workers compensation benefits as a result and has not worked since then. On June 18, 1996, he submitted to the Defendants an application for Disability Retirement Benefits ("Benefits") under the Plan. To satisfy an eligibility requirement under the Plan,[1] Plaintiff underwent a medical examination on August 30, 1996 with Dr. Michael H. LeWitt, M.D. ("Dr. LeWitt"), the physician designated by the Trustees of the Plan ("Trustees") to examine participants applying for disability benefits. Dr. LeWitt concluded the Plaintiff was permanently disabled[2]

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[1] Section C. Eligibility for Disability Retirement Benefits states:

(1) An Employee who (a) is, in the opinion of at least one qualified physician (designated by the Trustees), totally and permanently disabled by bodily injury or disease, so as to be unable to engage in any employment of the type provided by a Covered Employer, that is the major or basic tasks performed by a competent journeyman electrician, or qualifies as disabled for purposes of receiving federal social security long-term disability benefits; and

(b) is not engaged in regular employment or occupation for remuneration or profit in the electrical construction industry; and (c) has reached his thirtieth (30th) birthday; and (d) has earned a minimum of five (5) years of Credited Future Service and/or Credited Service for Vesting Pursuant to Section A of this Article II, shall be eligible to receive a disability retirement benefit.

[2] Dr. LeWitt wrote:

On examination, he has weakness of the right hand, with demonstrated loss of muscle, and neurologic damage to the right hand. Because of this injury and subsequent problems with his hand, he is disabled from working as a construction electrician. Based on the time interval since injury, and my findings at present, I believe he is permanently and totally

(Continued on following page)

and communicated his conclusions to the Trustees by letter, dated August 30, 1996. As a result, Plaintiff met all of the eligibility requirements under the Plan and awaited final approval by the Trustees.

The Trustees deferred review of Plaintiff's application several times and so notified Plaintiff. While the application was pending, however, the Trustees amended the Plan on May 22, 1997, revising the eligibility requirements for disability benefits ("Amendment"). Under the amended Plan, Plan participants no longer had to be certified disabled by a Plan physician. Rather, Plan participants had to qualify for Federal Social Security Disability Insurance Benefits ("S.S. DIB") in order to be eligible for Plan Benefits. On July 3, 1997, almost a year after the Plaintiff first applied for his Benefits, the Trustees denied his claim, citing the new requirement under the amended Plan. Plaintiff appealed the Trustees' decision but they denied his appeal on December 12, 1997. Plaintiff subsequently applied for S.S. DIB as required under the amended Plan but was denied on August 19, 1999. On November 15, 1999, Plaintiff, through counsel, requested that the Trustees reconsider his denial. On June 19, 2000, the Trustees, through counsel, denied Plaintiff's request, citing Plaintiff's failure to qualify for S.S. DIB.

On December 12, 2000, Plaintiff filed this Complaint under the following provisions of ERISA: (1) Count I, alleging breach of fiduciary duty under 29 U.S.C. § 1104(a); (2) Count II, alleging failure to provide requested documents

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disabled within the definition provided to me, by the [International Brotherhood of Electrical Workers].

under 29 U.S.C. § 1024(b); and (3) Count III, challenging the denial of his Benefits under 29 U.S.C. § 1132(a)(1)(B). Defendants answered and by way of defense, asserted that Plaintiff concealed relevant medical information during the initial examination by Dr. LeWitt. To support this defense, Defendants filed a Motion on June 20, 2001 seeking to compel Plaintiff to undergo a physical examination. On October 17, 2001 this Court denied Defendants' Motion to compel and awarded reasonable attorney fees to Plaintiff. The parties now come before the Court seeking summary judgment on all counts.

STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). This Court is required, in resolving a motion for summary judgment pursuant to Rule 56, to determine whether "the evidence is such that a reasonable [fact finder] could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In making this determination, the evidence of the nonmoving party is to be believed, and the district court must draw all reasonable inferences in the nonmovant's favor. *See id.* at 255. Furthermore, while the movant bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact, Rule 56(c) requires the entry of summary judgment "after adequate time for discovery and upon

motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986).

DISCUSSION

Evidentiary Scope under Arbitrary and Capricious Standard of Review

Courts reviewing claims challenging the denial of benefits under ERISA are restricted to the "arbitrary and capricious" standard when the trustee has discretionary authority under the plan to construe the terms of the plan or to determine the eligibility for benefits.[3] *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 109 (1989). This is the same as an "abuse of discretion" standard. *Id.* The arbitrary and capricious standard of review applies to both plan interpretation and factual determinations. *Mitchell v.*

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[3] There is no dispute here that the Plan grants the Trustees discretion to administer and interpret the Plan. Article V, Section A(1) of the Plan provides:

> The Trustees shall make [ ] rules and establish [ ] regulations for the administration of the Plan as they shall deem necessary and reasonable. . . . the Trustees have the exclusive right and discretion to interpret the Plan, to construe the terms and decide all questions arising in the administration and operation of the Plan, including but not limited to all questions of eligibility and status under the Plan. Any such interpretations or decisions of the Trustees so made shall, be conclusive and binding on all persons; provided, however, that all such interpretations and decisions shall be applied in a uniform manner to all Employees similarly situated.

Eastman Kodak Co., 113 F.3d 433, 438 (3d Cir. 1997). Where the trustee had discretion, a breach of fiduciary duty claim is also be determined under the arbitrary and capricious standard. *Moench v. Robertson*, 62 F.3d 553, 565-66 (3d Cir. 1995).

"Under the arbitrary and capricious standard, the court must defer to the administrator of an employee benefit plan unless the administrator's decision is clearly not supported by the evidence in the record or the administrator has failed to comply with the procedures required by the plan." *Abnathya v. Hoffman-La Roche, Inc.*, 2 F.3d 40, 41 (3d Cir. 1993). The court's scope of review is narrow, and "the court is not free to substitute its own judgment for that of the [administrator] in determining eligibility for plan benefits." *Id.* at 45 (citations omitted).

Given the deferential standard of review, district courts are to "look to the record as a whole," which "consists of evidence that was before the [trustee] when he or she made the decision being reviewed" when determining whether the actions of the trustees were arbitrary and capricious. *Mitchell*, 113 F.3d at 440. This means evidence outside of the administrative record not considered by the trustees is inadmissible. The purpose of this so-called "whole record rule" is to encourage communication between the plan administrators and beneficiaries so that the parties will fully utilize the administrative process and attempt to resolve conflicts before initiating litigation. *See Vega v. National Life Ins. Services, Inc.*, 188 F.3d 287, 299-300 (5th Cir. 1999).

Motion to Strike Affidavits of Dr. LeWitt and Sara Kelly

Before addressing the merits of each count, the Court will first address Plaintiff's request to strike two affidavits Defendants submitted under Federal Rule of Civil Procedure 56(e). The first is an affidavit by Dr. LeWitt, the Plan Doctor who originally diagnosed Plaintiff as disabled and the second is an affidavit by Sara Kelly, a full-time employee of the service provider engaged to perform contract administrative services for the Fund. Plaintiff also seek sanctions, arguing these affidavits violate Rule 56(e), this Court's October 17, 2001 Order, which denied Defendants' Motion to compel, and this Court's Scheduling Order.

Admissibility

Affidavits submitted with Rule 56 motions must be admissible. Rule 56(e) states, "affidavits shall be made on personal knowledge, [and] shall set forth such facts as would be admissible in evidence." Dr. LeWitt's affidavit is not admissible. First, the third statement contained in the affidavit is speculative and non-probative as to the Defendants' fraud defense. Moreover, as discussed above and in this Court's October 17, 2001 Order, the evidentiary scope of this case is clear. Under the arbitrary and capricious standard, the Court may only review the record before the Trustees at the time they made their decision. There is no evidence that the statements contained in the affidavit were considered by the Trustees at the time of denial. Similarly, Defendants have provided no evidence that the Trustees relied on the facts attested to by Sara Kelly in making their decision. Sara Kelly's affidavit is therefore also stricken.

Sanctions under 56(g)

Plaintiff seeks sanctions under Federal Rule of Civil Procedure 56(g) in connection with Defendants' attempt to submit the above discussed affidavits. Rule 56(g) states:

> Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Although this Court's October 17th 2001 Order outlined the proper standard of review and the applicable evidentiary scope of this case, the Court will allow the Defendants the benefit of doubt and decline to award attorney fees as it is not entirely clear that Defendants submitted these affidavits in bad faith.

Count III – Denial of Benefits

Plaintiff challenges the denial of his Benefits under 29 U.S.C. § 1132(a)(1)(B), which allows beneficiaries to bring civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." In determining whether the Trustees' decision to deny benefits was arbitrary and capricious, the Court must begin with the Plan itself, since an ERISA plan administrator must "discharge his duties with respect to a plan . . . in accordance with the documents and

instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [ERISA]." *Mitchell,* 113 F.3d at 439.

The essential facts of this case are not in dispute. Plaintiff met all of his eligibility requirements under the Plan at the time he applied for his Benefits in June 1996, waiting only final approval by the Trustees. The Trustees deferred reviewing Plaintiff's application and while Plaintiff's application was pending, the Trustees amended the Plan to require future applicants to successfully obtain S.S. DIB. It is undisputed that Plaintiff failed to obtain S.S. DIB, making him ineligible under the amended Plan.

Subject to the limitation under ERISA, the Trustees had the discretionary authority[4] to amend the Plan.[5]

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[4] Article VI Section A of the Plan states:

> The Trustees may at any time or times modify, alter, or amend the Pension Plan in any respect, retroactively or otherwise; provided, however that the intent of the Pension Plan is that at all times the Trust Fund will conform to all applicable laws, including, but not limited to, the requirements of ERISA and of the Labor Management Relations Act of 1947 . . .) No modification, alteration or amendment shall adversely affect any retirement benefit being paid to any Retired Employee . . .

[5] Defendants cite as a reason for deferring review of Plaintiff's claim, their concerns with the liberal requirements of the Plan as it existed at the time of Plaintiff's initial application. The evidence tends to show that Defendants did in fact have such concerns and these concerns did motivate the discussions during the Trustees meetings on amending the Plan and the ultimate decision to amend the Plan. Based on the belief that Dr. LeWitt seemed to certify all applicants sent to him as disabled, the Defendants claim they deferred review of Plaintiff's claim because Dr. LeWitt's recommendation was unreliable. Although such concerns may be legitimate reasons for amending the Plan or even

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Plaintiff does not challenge the Trustees' right to amend the Plan nor the validity of the Amendment. The issues are whether the Trustees abused their discretion by deferring review of an application, which plainly met all of the eligibility requirements at time of application, and whether the denial of benefits resulting from the Trustees's retroactive application of a new eligibility requirement to the applicant violates ERISA.

The Deferral

The Trustees violated ERISA and failed to abide by their own Plan Procedures while deferring review of Plaintiff's claim. Section H(1) of the Plan which governs the Claims Procedure, states that Trustees are to review the application "[w]ithin 90 days . . . or notify the claimant that additional time is needed, explain the reason for the extension, and indicate when a decision on the claim will be made, which must be within 180 days of the date claim is filed." The Trustees, therefore, were under a duty to timely review claims for benefits. Section H(2) further provides:

> A denial by the Trustees of a claim for benefits shall be stated in writing and delivered or mailed

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perhaps appointing a new physician, the decision to amend the Plan is distinct and separate from the Trustees' decision to defer review of an application that plainly met the eligibility requirements under the Plan in effect at the time of application. As discussed more fully below, the Defendants should have further investigated Dr. LeWitt's medical conclusions if they felt his opinions were unreliable. Instead, they merely relied on their suspicions. Defendants' failure in this regard is particularly peculiar considering that Dr. LeWitt is the Plan's chosen physician.

> to the claimant, written in a manner calculated to be understood by the claimant without benefit of legal or actuarial counsel. The notice shall include specific reference to the Plan provisions on which the denial is based and a description of any additional material or information necessary to perfect the claim, an explanation of why this material or information is necessary, and the steps to be taken if the claimant wishes to submit his claim for review.

Section H of the Plan is consistent with the requirements under ERISA and the guidelines which provide that a claim of denial is to be in writing which sets forth the specific reasons for denial. *See Skretvedt v. E.I. Dupont de Nemours and Co.*, 268 F.3d 167, 178 n.8 (3d Cir. 2001) (citing 29 U.S.C. § 1133(1) and 29 C.F.R. § 2650.503-1(g) (2001)).[6]

The purposes behind these rules dealing with notice are to encourage prompt review of claims and communication between the applicants and the plan administrator which will facilitate rational decision-making. *See Booton v. Lockheed Med. Benefit Plan*, 110 F.3d 1461, 1463 (9th Cir. 1997) (explaining that ERISA regulations call for a "meaningful dialogue" and that if "more information is needed to make a reasoned decision, [the plan administrators] must ask for it"). Here, the Trustees' actions defeated all of these purposes, ultimately resulting in an arbitrary and capricious decision to deny Plaintiff his Benefits.

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[6] The claims procedure and ERISA sections referring to denial notices are equally applicable to deferral notices because the deliberate deferral of Carney's application ultimately led to the denial of his benefits.

Carney's June application was presented to the Trustees on November 7, 1996. At this time, the Trustees decided to defer review of Carney's application. The first notice of deferral, dated December 20, 1996, simply stated the need for "further review." No specific grounds for the deferral were indicated nor did the Trustees ask Plaintiff for more information. On May 7, 1997, the Trustees sent another letter of deferral, citing "review by the Trustees of the Plan's procedures regarding disability pension applications." On May 22, 1997, the Trustees amended the Plan and made the decision to retroactively apply the Amendment to pending applications, including Carney's. These notice letters do not come close to the specificity required under ERISA. Moreover, the Defendants failed to review Carney's claim in a reasonably timely manner, finally making a decision almost a year after Carney's initial application.

Defendants offer as a reason for the deferrals, their fiduciary duty to investigate suspicious applications. The Court agrees with Defendants that as fiduciaries of the Plan, they should have further investigated Plaintiff's applications if they had concerns about its legitimacy.[7] It is precisely one of the reasons ERISA requires Trustees to

[7] Defendants did not communicate or investigate any of their suspicions. During the period of deferral, Defendants never once asked Plaintiff for more information nor acted to gather more information from Dr. LeWitt, whose diagnosis they now attempt to discredit. In fact, on March 6, 2000, after the Amendment and during the final appeal, the Defendants finally asked for medical releases from Plaintiff. There is, however, no evidence the Defendants actually sought out any more medical records before making the final decision to deny Carney his disability benefits.

specifically spell out the reasons for their decisions. An applicant who is under the impression that he or she has met all the eligibility requirements under the Plan is not likely to provide further information unless the Trustees specifically ask for it. Only with the necessary information can the Trustees make a rational decision. Unfortunately, the Defendants here failed to communicate with Plaintiff and as a result, failed to properly investigate the merits of Carney's claim in a timely manner. Instead, they waited to amend the Plan and summarily rejected Plaintiff's claim, citing the new requirement under the Amendment.

The Decision to Deny

In effect, by retroactively applying the Amendment to Carney's pending claim, the Trustees changed the eligibility requirements on Carney after he put in an application which clearly satisfied the eligibility requirements for disability benefits at the time of his application. This type of action violates ERISA. *See Brug v. Pension Plan of Carpenters,* 669 F.2d 570 (9th Cir. 1982). Because the retroactive application of the Amendment to Carney's pending claim violates ERISA, the Court will review Carney's claim under the original plan requirements which were in effect at the time of his initial application in June of 1996.

The general rule is that where there was an appeal, the whole record is at time of final denial. *Mitchell,* 113 F.3d at 440. Here, however, because of the change in the eligibility requirements between the time of initial application and the final denial, the record changed to include a S.S. DIB Report ("Report") by an administrative judge which denied Plaintiff's application for S.S. DIB. The

Court will exclude this Report from its review because the Defendants improperly based their final decision to deny, partly on this Report. The only reason this Report is part of the administrative record is because of the Defendants' arbitrary delay in reviewing the merits of Carney's claim.[8]

The Trustees admit that Carney met all of the eligibility requirements pre-Amendment. They argue, however, that even when all of the eligibility requirements are met, the Trustees have the discretion to deny benefits. The Trustees do have discretion, but not unfettered discretion which results in an arbitrary and capricious decision. Rather, their decisions must be grounded on some evidence, not mere unfounded suspicions. *Vega,* 188 F.3d at 302. Furthermore, the Defendants will not be excused by offering post hoc reasons never communicated to Plaintiff. *See Skretvedt,* 268 F.3d at 177 (finding justifications to be post hoc because they were never offered to applicant following the denial of his initial claim or his appeal).[9]

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[8] In the alternative, even if it was proper to consider the facts contained in the S.S. DIB Report, the Trustees should have granted Carney his disability benefits under the original Plan. The administrative judge denied Carney S.S. DIB because Carney also suffers from drug and alcohol problems and bipolar disorder. The judge, however, found that Carney could not perform the job of an electrician which, rather than contradicting the opinion rendered by Dr. LeWitt in 1996, supports a finding of disability under the Plan.

[9] In footnote 8, the *Skretvedt* Court strongly disapproved of post hoc rationales, stating:

> The Board's failure to provide Skretvedt with reasoned explanations for why it denied his disability claims or information on what evidence he could present to improve his claims raises policy concerns that underlie the notice requirements that ERISA places on pension and benefit review

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The Defendants offer the following reasons for their decision to defer and ultimately deny Carney his benefits: (1) the inadequacy of Dr. LeWitt's medical conclusions due to Plaintiff's alleged failure to provide complete medical information; (2) the Trustees' belief that Plaintiff's disability could be cured by surgical procedure based on knowledge of others who had carpel tunnel, had surgery and were able to return to work; and (3) one Trustee's suspicion that Plaintiff could work because he saw Carney at some point working as a pusher. None of these reasons, however, were ever communicated to Plaintiff, neither in his deferral notice letters nor in his denial letters. Moreover, Defendants did not investigate these matters nor ask

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> boards. Specifically, the review boards must give reasons to applicants for denying their claims so that: (1) applicants may clarify their application on appeal; and (2) federal courts may exercise an informed and meaningful review of the pension boards' decisions.

The Third Circuit went on to agree with the Sixth Circuit, citing *University Hosp. of Cleveland v. Emerson Elec. Co.*, 202 F.3d 839 (6th Cir. 2000) where the court explained:

> it strikes us as problematic to, on one hand, recognize an administrator's discretion to interpret a plan by applying a deferential "arbitrary and capricious" standard of review, yet, on the other hand, allow the administrator to "shore up" a decision after-the-fact by testifying as to the "true" basis for the decision after the matter is in litigation, possible deficiencies in the decision are identified, and an attorney is consulted to defend the decision by developing creative post hoc arguments that can survive deferential review. . . . To depart from the administrative record in this fashion would, in our view, invite more terse and conclusory decisions from plan administrators, leaving room for them – or, worse yet, federal judges – to brainstorm and invent various proposed "rational bases" when their decisions are challenged in ensuing litigation.

Plaintiff for more information to ascertain whether in fact Plaintiff could be cured by surgery. Therefore, the Court finds Defendants' proffered reasons to be post hoc rationalizations.

Lastly, the Defendants' request for a remand to the Trustees is denied. The Trustees had more than four years to gather the relevant information instead of relying on mere suspicions. *See Vega* 188 F.3d at 302 n. 13 (remand denied where the administrator relied on unfounded suspicions and failed to gather relevant information for the record before litigation). Because the Trustees acted in an arbitrary and capricious manner in delaying Plaintiff his Benefits for over four years, the Trustees' decision to deny Carney his Benefits is reversed.[10]

Count I – Breach of Fiduciary Duty

Plaintiff also asserts a breach of fiduciary duty claim against the individual Trustees under Count I. *See* 29 U.S.C. § 1104(a) (describing fiduciary duties of ERISA plan trustees). Relief for § 1104 violations, however, is equitable. Under 29 U.S.C. § 1132(a)(3), a participant may bring

[10] Section C of the Plan further provides, "An employee who has qualified for such disability retirement benefit shall submit such evidence of continuing and total and permanent disability as may be required by the Trustees from time to time, but, after the first full year of disability, not more frequently than annually." The Court expresses no views on whether Carney could have shown evidence of continuing permanent disability during the last four years nor whether he will be able to show evidence of continuing permanent disability in the future. The Court trusts that the Trustees will fulfill their fiduciary duties by acting in good faith and applying the terms of the Plan in a fair and rational manner in light of this opinion.

suit "(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." In certain cases, equitable relief may include monetary recovery. *See Ream v. Frey,* 107 F.3d 147, 152-153 n.5 (3d Cir. 1997). The Third Circuit, however, cautioned that "[w]here Congress otherwise has provided for appropriate relief for the injury suffered by a beneficiary, further equitable relief ought not to be provided. *See Ream,* 107 F.3d at 147 (discussing *Varity Corp. v. Howe,* 516 U.S. 498 (1996) where the Supreme Court specifically noted the catch-all nature of § 1132(a)(3) and cautioned against its expansion). The *Ream* Court further opined, in "a case which an individual plan beneficiary charges a fiduciary with a breach of fiduciary duties with respect to a functioning plan . . . it might be inappropriate to permit a beneficiary to seek personal relief. . . . " under 1132(a)(3). *Id.*

Here, Plaintiff has obtained full relief under § 1132(a)(1)(B) for the wrongful denial of his Benefits. Therefore, although the Trustees in this case have clearly breached their fiduciary duties, relief under § 1132(a)(3) is unnecessary. Accordingly, Count I is dismissed.

Count II - Failure to Provide Documents

Plaintiff also seeks statutory penalties[11] under Count II, alleging failure to provide requested documents[12] in violation of 29 U.S.C. § 1024(b), § 104 of ERISA. Section 104(b)(4) states, "The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary, plan description, and the latest annual report, any terminal report, the bargaining

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[11] 29 U.S.C. § 1132(c) provides that the penalty for failure to comply with § 104 is:

> (1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title or section 1021(e)(1) of this title with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation.

[12] The Plaintiff seeks the following maximum statutory penalties as a result of Defendants' delay in forwarding some documents and complete failure to forward others. The Trust agreement was provided 22 days late which results in a maximum statutory penalty of $2,200.00. The delay in providing minutes of trustee meetings, requested on 9/3/98 and provided during discovery on 5/24/01, was calculated at 993 days, resulting in a maximum penalty of $99,300. The actuarial reports were never provided.

agreement, trust agreement, contract, or other instruments under which the plan is established or operated." Defendants do not dispute the essential elements of Plaintiff's § 1024 claim. Rather, Defendants argue the Court should not award penalties because: (1) Defendants responded in good faith; (2) Plaintiff failed to vigorously pursue the document requests; and (3) Plaintiff was not harmed or prejudiced by the lateness or failure to receive the documents.

The court has discretion whether to award statutory penalties for § 1024(b) violations. *Gillis v. Hoechst Celanese Corp.*, 4 F.3d 1137, 1148 (3d Cir. 1993). Although no harm need be shown, courts have either reduced the amount of penalty or declined to award penalties where no prejudice or intentional misconduct was shown. *See Conowall v. General Instrument Corp. Pension Plan,* Civ. A. No. 87-7976, 1989 WL 79800 *3-4 (E.D. Pa. July 7, 1989); *Ahern v. Kencor, Inc.,* Civ. A. No. 97-295, 1998 WL 47272 *3 (E.D. Pa. Feb. 5, 1998). The facts show Plaintiff did not vigorously pursue his request for the documents at issue. Moreover, Plaintiff alleges neither harm nor prejudice from Defendants' § 1024(b) violations. Accordingly, the Court declines to award statutory fines in this case.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANDREW CARNEY	:	
	:	CIVIL
v.	:	ACTION
	:	
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 98 PENSION FUND, et al.	:	No. 00-6270

ORDER

AND NOW, this 23rd day of May, 2002, in consideration of the Cross-Motions For Summary Judgment filed by the Plaintiff, Andrew Carney (Doc. No. 19), and Defendants, International Brotherhood of Electrical Workers Local Union 98 Pension Fund, Scott Ernsberger, John J. Dougherty, Edward Neilson, Joseph Agresti, Thomas J. Reilly, Jr., Dennis Link and William C. Rhodes (Doc. No. 20), and the responses thereto, it is **ORDERED**:

1. Plaintiff's Motion to strike Affidavit of Dr. LeWitt and Sara Kelly is **GRANTED**. The Affidavits are **STRICKEN**.

2. Plaintiff's Motion for Sanctions under Federal Rule of Civil Procedure 56(g) is **DENIED**.

3. Defendants' Motions for Summary Judgment as to Count I and II of the Complaint are **GRANTED**. Plaintiff's Motions for Summary Judgment as to Count I and II of the Complaint are **DENIED**.

   A. Judgment is **ENTERED** in favor of Defendants, Scott Ernsberger, John J. Dougherty, Edward Neilson, Joseph Agresti, Thomas J. Reilly, Jr., Dennis Link and William C. Rhodes and against Plaintiff on Count I and II of the Complaint.

4. Plaintiff's Motion for Summary Judgment as to Count III is **GRANTED**. Defendants' Motion for Summary Judgment as to Count III is **DENIED**.

   A. Judgment is **ENTERED** in favor of Plaintiff and against Defendant International Brotherhood of Electrical Workers Local Union 98 Pension Fund on Count III of the Complaint.

   B. Defendant International Brotherhood of Electrical Workers Local Union 98 Pension Fund is **ORDERED** to commence payment of Disability Retirement Benefits to the Plaintiff, Andrew Carney. Defendant is further **ORDERED** to pay Plaintiff all back due and owing Disability Retirement Benefits, plus interest, based on his application of June 1996.

5. The Clerk of the Court is **DIRECTED** to mark this case as **CLOSED**.

BY THE COURT:

/s/ James McGirr Kelly
JAMES McGIRR KELLY; J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 02-2679 and 02-3488

ANDREW CARNEY

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 98 PENSION FUND; SCOTT ERNSBERGER ADMINISTRATOR; JOHN J. DOUGHERTY, TRUSTEE; EDWARD NEILSON, TRUSTEE; JOSEPH AGRESTI, TRUSTEE; THOMAS J. REILLY, JR., TRUSTEE; DENNIS LINK, TRUSTEE; WILLIAM C. RHODES, TRUSTEE

International Brotherhood of Electrical Workers Local Union 98 Pension Fund,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
D.C. Civil No. 00-cv-06270
District Judge: The Honorable James McGirr Kelly

Present: SCIRICA, *Chief Judge*, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, BECKER,* and BRIGHT,** *Circuit* Judges

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* Judge Becker is limited to panel rehearing only.

** Judge Bright is limited to panel rehearing only.

SUR PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing en banc filed by appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing en banc is DENIED.[1]

BY THE COURT:

/s/ Maryanne Trump Barry
Circuit Judge

Dated: JUN 24 2003
gkl/cc: EJF
KEB
JLF

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[1] The Non-Precedential Opinion contains a typographical error on page five of the slip opinion. Specifically, the date "July 31, 1991" in the eleventh line from the top of the page should instead read "August 30, 1996."